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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JAIME ERAZO, Defendant and Appellant.	B183396 (Los Angeles County Super. Ct. No. BA264182)

APPEAL from a judgment of the Superior Court for the County of Los Angeles, Stephen A. Marcus, Judge. Affirmed.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves and Dane R. Gillette, Chief Assistant Attorneys General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Jaime Erazo was convicted by a jury of one count of committing a lewd act on a child under the age of 14 years and sentenced to three years in state prison. On appeal Erazo contends the trial court erred in excluding expert testimony concerning child suggestibility and implanted memory, his conviction is not supported by substantial evidence and the prosecutor improperly commented on his failure to testify in violation of *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106] (*Griffin*). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

An information charged Erazo with one count of committing a lewd act on a child less than 14 years old (Pen. Code, § 288, subd. (a)).[1] According to the evidence presented at trial, Erazo and Maria E. lived in the same apartment building. Erazo lived in an upstairs apartment; Maria E. and her two daughters, A. E. and Carol E., lived in an apartment directly beneath Erazo's on the first level. Neither Maria E. nor her daughters knew Erazo well.

On April 24, 2004 five-year-old A. E. was playing outside her own apartment with Carol while Maria E. went downstairs to put the garbage in the dumpster. Erazo passed the girls on his way upstairs to his apartment. Carol went inside while A. E. continued to play outside. Moments later, Erazo came back downstairs and picked A. E. up by her arms even though she had not been in his way. According to A. E.'s testimony, when Erazo picked her up, he slid his hand inside her underwear near her vagina and wiggled his fingers, then put her down and walked away without saying anything.

When Maria E. returned to the apartment a few minutes later, A. E. told her angrily, "Mommy, Mommy, this man touched me" and demonstrated for her mother by putting her hand near her crotch area and moving her fingers. Maria E. confronted Erazo, demanding, "What did you do?" Erazo responded he had not done anything to A. E. Maria E. called the police. Before the police officers arrived, Erazo went to Maria E.'s

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[1] Statutory references are to the Penal Code unless otherwise indicated.

apartment pleading, "Let's fix things. Let's talk." Maria E. told him, "You're not going to fix things with me. The authorities are coming over," and closed the door.

Los Angeles Police Department Officer Sammy Cruz separately interviewed A. E. and Maria E. along with another police officer. A. E. explained she had been playing with other children when Erazo had removed her from the group and touched her inside her underwear near the crotch area. Cruz also interviewed Erazo, who admitted he had picked A. E. up from underneath her arms, but vehemently denied touching A. E. inappropriately. When pressed by Cruz, Erazo stated that, if he had touched A. E.'s genitals, it was by accident. Erazo could not explain why he had picked up A. E. in the first place and chose not to answer when Cruz asked him how he could have slipped his hand inside A. E.'s underwear by accident.

At trial Erazo sought to introduce expert testimony from a child psychologist on the inherent suggestibility of children and the techniques that should be employed during interviews with children to prevent false accusations. In an offer of proof, Erazo's counsel explained, although there was no direct evidence suggestible interview techniques had been employed, A. E.'s version of events had changed over time, creating an inference her story had been influenced by the adults who questioned her. Erazo's counsel also argued the proffered testimony would show generally that children are inherently suggestible.

After holding an Evidence Code section 402 hearing and reviewing both the preliminary hearing testimony and the police reports, the court excluded the proffered testimony, concluding, in light of the absence of any evidence that A. E.'s description of the improper touching had changed materially over time, the expert testimony would not aid the jury and would be confusing and necessitate an undue consumption of time. The court explained, if, during trial, some evidence of an interview technique emerged raising the specter of suggestibility, it would reconsider its ruling.[2]

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[2] The trial court stated, "We have here a very simple and straightforward case where a little child tells, initially, her mother that this is what happens, and the facts she tells her

Erazo did not testify and did not present any evidence. Erazo was convicted of engaging in lewd conduct with a child under 14 years old and sentenced to the low term of three years in state prison.[3]

DISCUSSION

1. *The Trial Court Did Not Commit Prejudicial Error in Excluding the Expert Testimony on Child Suggestibility*

Expert testimony is admissible if it is related to a subject sufficiently beyond common experience that it would assist the trier of fact. (*People v. Brown* (2004) 33 Cal.4th 892, 900; Evid. Code, § 801, subd. (a).) On the other hand, "[e]xpert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness." (*People v. Torres* (1995) 33 Cal.App.4th 37, 45.) We review the trial court's decision on the admissibility of evidence, including expert opinion testimony, for abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 266; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299.)

Although there is no appellate authority in California directly considering the admissibility of expert testimony concerning child suggestibility and implanted memory, some jurisdictions have admitted such evidence, at least when there is some indication suggestive interview techniques have occurred. (See generally annot., Admissibility of

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mother are very straightforward and simple. I mean, this is not some complicated, you know, 'someone sneaked into my bed,' or 'this happened or that.' I mean, it's, 'Someone picked me up and put his hand in my panties or underwear.'" "[T]he expert that you are offering would not offer any valid expert testimony that would aid the jury, if the facts play out the way I've just described them, and that, in fact, if he were to testify about suggestive techniques and techniques of interviewing child witnesses, that would be somewhat confusing to the jury, because we don't have that situation, that it would, further, be time consuming on an area that just doesn't seem to exist, in my mind and based on what I know about the case. . . . However, I want to make it clear to both sides that I am willing to change that ruling if I hear evidence that . . . shows some kind of suggestibility or some kind of interview technique caused the witness to testify the way she did."

[3] The information had also charged Erazo with false imprisonment. After the People had rested their case, the trial court dismissed the false imprisonment charge for insufficient evidence.

Expert Testimony as to Proper Techniques for Interviewing Children or Evaluating Techniques Employed in a Particular Case (2001) 87 A.L.R.5th 693 (and cases cited therein); see also *U. S. v. Rouse* (8th Cir. 1997) 111 F.3d 561, 571-572; *Barlow v. State* (Ga. Ct. App. 1998) 507 S.E.2d 416, 417-418 [expert testimony on suggestibility of children during interview process admissible because most jurors lack knowledge of accepted practices in interviewing child victim and cross-examination of child witness not sufficient for defendant to demonstrate manner in which information was initially obtained from child victim was improper]; *State v. Malarney* (Fla. Dist. Ct. App. 1993) 617 So. 2d 739, 740-741 [error to exclude expert testimony attacking techniques employed by police in interviewing child victim in a sex abuse case].)

Other states have expressed some reluctance to admit expert testimony on child suggestibility generally, concluding expert opinion on the subject offers no inherent advantage over the knowledge possessed by lay people. (See, e.g., *State v. Ellis* (Me. 1996) 669 A.2d 752, 753-754 [while defendant was entitled to present evidence on the interview techniques that occurred and argument that such techniques may have influenced the children's testimony, "[d]efendant was not entitled to have his argument buttressed by the presentation of common knowledge in the form of an expert scientific opinion"]; *Commonwealth v. Allen* (Mass. App. Ct. 1996) 665 N.E.2d 105; *People v. Johnston* (N.Y.S.2d 2000) 273 A.D.2d 514 [issue of child victim's susceptibility to suggestive interrogation in molestation prosecution was subject matter within jurors' common knowledge experience]; cf. *People v. Wells* (2004) 118 Cal.App.4th 179, 189 [as general rule, expert testimony as to witness's credibility not permitted because "jurors are generally considered to be equipped to judge witness credibility without the need for expert testimony"].)

In *U. S. v. Rouse, supra,* 111 F.3d 561, the United States Court of Appeals for the Eighth Circuit acknowledged the fine line between expert testimony on child suggestibility and the danger of implanted memory, on the one hand, and improper opinion testimony concerning a witness's veracity, on the other hand: "A qualified expert may explain to the jury the dangers of implanted memory and suggestive practices

when interviewing or questioning child witnesses, but may not opine as to a child witness's credibility. That leaves a troublesome line for the trial judge to draw -- as the expert applies his or her general opinions and experiences to the case at hand, at what point does this more specific opinion testimony become an undisguised, impermissible comment on a child victim's veracity?" (*Id.* at p. 571.)

This case, however, does not require an answer to the question posed by the Eighth Circuit. The trial court, in its discretion, properly excluded the testimony based on the absence of any evidence, direct or circumstantial, that A. E.'s testimony was the result of suggestive interviewing techniques. Although A. E.'s reports of incidental details of the episode, including whether she was alone or with other children at the time it occurred, had varied, her descriptions of the touching, both verbal and demonstrative, were materially consistent from the time she told her mother immediately after the incident occurred until the time she testified at trial. In addition, there was no evidence as to any particular form of questions or interviewing techniques employed by police in this case, suggestive or otherwise. Finally, there was no evidence Maria E. either had any motive or had engaged in any action to encourage A. E.'s initial description of events. Even in jurisdictions that explicitly recognize the admissibility of expert testimony on child witness suggestibility, expert testimony on the subject is properly excluded absent any evidence of suggestive techniques because its only purpose in that circumstance is to attack the witness's credibility. (See, e.g., *State v. Kirschbaum* (Wis. 1995) 535 N.W.2d 462 [while it may be an erroneous exercise of discretion to exclude expert testimony on the issue of suggestive interview techniques used with a young child witness, counsel's affidavit "failed to point to a single specific example of an improper interview technique that her expert would discuss . . . ." Under those circumstances, trial court did not err in denying request for permission to hire expert]; *State v. Michaels* (N.J. 1994) 642 A.2d 1372, 1382-1383 [expert witness may explain coercive or suggestive propensities of interview techniques actually employed].) Based on this record, we have little difficulty concluding the trial court did not abuse its discretion in excluding the expert testimony on the ground it would not aid the trier of fact.

Moreover, even if the proffered expert testimony satisfied Evidence Code section 801's requirement that it aid the trier of fact and did not improperly impinge on the role of the jury to determine credibility, the trial court not abuse its discretion -- that is, behave arbitrarily or capriciously -- when it excluded the testimony on the ground that, absent any direct or circumstantial evidence of suggestive interview techniques, such testimony would confuse and mislead the jury and cause unnecessary delay. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124 [trial court's ruling excluding evidence under Evid. Code, § 352 may be reversed only when ruling is "'arbitrary, capricious or patently absurd'" resulting in a "'manifest miscarriage of justice'"]; see also *People v. Alcala* (1992) 4 Cal.4th 742, 788 [expert testimony pertaining to interrogation techniques was not improperly excluded under Evid. Code, § 352; such testimony would have likely injected "'undue delay and confusion into the judicial process'" and resulted in "'parades of expert witnesses'"].)

2. *Substantial Evidence Supports the Jury's Verdict*

Erazo contends the evidence is insufficient to support the jury's verdict. In reviewing a challenge to the sufficiency of the evidence, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432; *People v. Staten* (2000) 24 Cal.4th 434, 460; *People v. Hayes* (1990) 52 Cal.3d 577, 631.) Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime or the special allegation present beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the jury's finding].'" (*Bolin,* at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

"Substantial evidence" in this context means "evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant

guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *People v. Hill* (1998) 17 Cal.4th 800, 848-849.) "Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt." (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

Although Erazo acknowledges the testimony of a single witness may be sufficient evidence to support a verdict (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885; *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614), he contends A. E.'s testimony was so inconsistent as to be inherently incredible. Erazo argues A. E.'s account of the details of the touching (that is, exactly where on her body he had placed his hand) changed over time. He also observes A. E. testified at the Evidence Code section 402 hearing that, in addition to her, her sister and her mother, two men also resided in her apartment, including her uncle Cayo; yet three days later, during cross-examination at trial, she testified her uncle Cayo did not live with her. During the preliminary hearing A. E. testified she had learned a Spanish nickname for vagina from her grandfather, but testified at trial she had never met her grandfather, who lived in Guatemala. Finally, A. E. also told police officers during her interview she had been playing with other children when Erazo picked her up, but at trial testified she had been playing alone and denied telling the officers she had been with other children.

A witness's testimony may be rejected on appeal only when it is physically impossible or inherently improbable. (*People v. Mayberry* (1975) 15 Cal.3d 143, 150; *Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.) To be inherently improbable, "the evidence must assert that something has occurred that it does not seem possible could have occurred under the circumstances disclosed." (*Mayberry*, at p. 150; *People v. Headlee* (1941) 18 Cal.2d 266, 267.) Nothing about A. E.'s description of the improper touching was inherently improbable or physically impossible. A. E. testified that Erazo picked her up underneath her shoulders, slid his hand inside her underwear near her crotch area and wiggled his fingers. That testimony was plainly sufficient to support the

jury's verdict that Erazo had engaged in lewd conduct with her. (See § 288, subd. (a) ["[a]ny person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years"]; *People v. Martinez* (1995) 11 Cal.4th 434, 442 [§ 288 is violated by any "'touching' of an underage child committed with the intent to sexually arouse either the defendant or the child"].) The jury evaluated A. E.'s credibility and, despite some inconsistencies in her testimony, found her description of the improper touching to be true. A. E.'s testimony constitutes substantial evidence supporting the jury's verdict. (See *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 878 ["the fact that inconsistencies may occur in the testimony of a given witness does not require that such testimony be disregarded in its entirety . . . . It is for the trier of fact to consider internal inconsistencies in testimony, to resolve them if this is possible, and to determine what weight should be given to such testimony"].)[4]

3. *The Prosecutor Did Not Commit Griffin Error*

Neither the People nor the trial court may comment on a defendant's failure to testify or urge the jury to infer guilt from the defendant's silence. (See *Griffin, supra,* 380 U.S. at p. 615 [People and trial court are constitutionally prohibited from converting defendant's decision not to testify into evidence of defendant's guilt; to do so impermissibly burdens defendant's invocation of his or her Fifth Amendment rights]; *Portuondo v. Agard* (2000) 529 U.S. 61, 67-69 [120 S.Ct. 1119, 146 L.Ed.2d 47]; *People v. Hardy* (1992) 2 Cal.4th 86, 154; see also *People v. Medina* (1974) 41 Cal.App.3d 438, 457 [finding *Griffin* error when prosecutor's comments had effect of "urg[ing] the jury to believe the testimony of the three accomplice witnesses because the defendants, who

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[4] In this case, the jury was presented with more than the testimony of a single witness. In addition to A. E.'s description of the incident, Officer Cruz testified about Erazo's damaging admissions during his interview with him.

were the only ones who could have refuted it, did not take the stand and subject themselves to cross-examination and to prosecution for perjury"].) However, the *Griffin* prohibition does not extend to comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1229.)

Erazo insists the prosecutor committed *Griffin* error during closing argument when he stated, "Ladies and gentlemen, [defense counsel] makes a big deal about the fact that the child didn't point directly on her vagina, was about an inch away from her vagina. Ask yourselves this: If you're asked in front of a group of strangers to show where a man touched you, would you exactly grab your genitalia? Or would you point right over it, right near it, right around it? It is outrageous to suggest that the defendant did absolutely nothing wrong by putting his hand inside a five year-old's pants. How does that happen? You heard absolutely no explanation of how that could possibly happen."

Erazo, who objected to the prosecutor's statement at trial, argues it constituted a direct comment on his failure to testify. We agree with the trial court that, considered in context, the remark was simply a fair comment on the evidence: Officer Cruz testified Erazo had admitted during the initial police interview that he had picked A. E. up but could not explain why. Erazo then said that his hand may have slipped inside A. E.'s underwear accidentally. When asked to explain this statement, Erazo did not reply. The prosecutor's statements regarding the absence of explanation for Erazo's defense of "accident" was a fair comment on this testimony. The prosecutor's remark was also a fair response to the argument of defense counsel, who asserted any touching was innocent but also offered no explanation of how an accidental touching could have occurred. (See *People v. Hughes* (2002) 27 Cal.4th 287, 394 [fair comment on state of evidence falls outside of *Griffin* prohibition]; *People v. Mincey*, *supra*, 2 Cal.4th at p. 446 [same]; *People v. Medina* (1995) 11 Cal.4th 694, 755-756 [comments that addressed defense failure to provide rational explanation for why defendant was armed was a remark on the evidence, not on defendant's silence].)

Following Erazo's objection, in "an abundance of caution" the court ordered the prosecutor to clarify his statement by indicating to the jury he was referring to Erazo's out-of-court statements and the assertions by his counsel during closing argument.[5] Heeding the court's admonition, the prosecutor then stated, "Here's this man who had the opportunity to tell police why he did what he did, and even he cannot come up with it. And counsel comes up here and she cannot give you an explanation. That says something ladies and gentlemen. He does not have a reasonable explanation for what he did." In light of this clarification, there is no reasonable likelihood the jury would have understood the remark in the prejudicial manner Erazo asserts. (*People v. Roybal* (1998) 19 Cal.4th 481, 514 [when ambiguous remark is challenged as an unconstitutional comment on the defendant's failure to testify in violation of *Griffin,* appellate court applies a reasonable likelihood standard, "inquiring whether there is a reasonable likelihood the jurors misconstrued or misapplied the words in question"].)

In any event, considering the brevity of the reference, the People's clarification, the trial court's instruction to the jury not to draw any inference from the defendant's failure to testify[6] and the strength of the testimony from A. E. and Officer Cruz, any violation of *Griffin* in this case was harmless beyond a reasonable doubt. (See *United States v. Hasting* (1983) 461 U.S. 499 [103 S.Ct. 1974, 76 L.Ed.2d 96] [*Griffin* error subject to harmless error review under *Chapman v. California* (1967) 386 U.S. 18, 22 [87 S.Ct. 834, 17 L.Ed.2d 705]; *People v. Medina, supra,* 11 Cal.4th at p. 756 [acknowledging most indirect *Griffin* error is harmless in any event]; *People v. Vargas* (1973) 9 Cal.3d 470, 478-481 [same].)

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[5] The court stated, "Out of an abundance of caution, even though I don't feel it is a *Griffin* error, why don't you indicate to the jury, in the next thing that you're referring to, the statements by the defendant" and by counsel.

[6] The trial court instructed the jury in accordance with CALJIC No. 2.60 that a "defendant in a criminal trial has a constitutional right not to be compelled to testify" and that the jury must "not draw any inference from the fact that a defendant does not testify."

DISPOSITION

The judgment is affirmed.

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PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.